

DOCKET NO. 590508

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
MARY JO HENDERSON & MARY MODKINS HENDERSON D/B/A HITCHING POST PERMIT/LICENSE NO. BG308916 FALLS COUNTY, TEXAS (SOAH DOCKET NO. 458-10-3100)	§	ALCOHOLIC
	§	
	§	BEVERAGE COMMISSION

ORDER ADOPTING THE PROPOSAL FOR DECISION

The above-styled and numbered cause is before the Assistant Administrator, Texas Alcoholic Beverage Commission for consideration and entry of the agency order.

After proper notice was given, this case was heard by Administrative Law Judge Tommy L. Broyles. The hearing convened on the 22nd day of April, 2010 and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 9th day of June, 2010. The Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

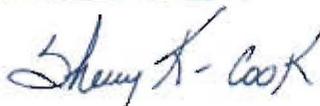
The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law made by the Administrative Law Judge.

IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that no action be taken against Respondent's permit.

This Order will become final and enforceable on the 20th day of August, 2010, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this the 27th day of July, 2010, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

A copy of this Order has been served upon all parties in the manner indicated below on July 27, 2010.



Joan C. Bates,
Assistant General Counsel
Texas Alcoholic Beverage Commission

Honorable Judge Tommy L. Broyles
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
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Judith L. Kennison
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Waco District Office

DOCKET NO. 458-10-3100

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	
	§	OF
	§	
MARY JO HENDERSON D/B/A HITCHING POST LICENSE NO. BG308916 FALLS COUNTY TEXAS (TABC CASE 590508)	§	
	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff) brought this action against Mary Jo Henderson d/b/a Hitching Post (Respondent) seeking suspension of Respondent's Wine and Beer Retailer's On Premise Permit, BG-308916. Staff alleged Respondent, her agent, servant, or employee, permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours, in violation of Texas Alcoholic Beverage Code (Code) §§ 105.06, 61.71(a)(18) and/or 32.17(a)(7). This Proposal for Decision finds the Petitioner did not prove the allegations by a preponderance of the evidence.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The hearing in this matter convened April 22, 2010. Attorney Judith Kennison represented Staff. Respondent was represented by attorney John Cullar. Administrative Law Judge (ALJ) Tommy Broyles presided. The hearing was concluded and the record closed that same day.

Jurisdiction for this proceeding is established under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.46. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

II. STATUTORY AUTHORITY

TEX. ALCO. BEV. CODE § 105.06(b) states that in a standard hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 1:15 a.m. and 12 noon or on any other day between 12:15 a.m. and 7 a.m.

TEX. ALCO. BEV. CODE § 61.71(a) (18) states that the commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee consumed an alcoholic beverage or permitted one to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited by this code.

TEX. ALCO. BEV. CODE § 32.17(a) (7) states that the Commission or administrator may cancel or suspend for a period of time not exceeding 60 days, after notice and hearing, an original or renewal private club registration permit on finding that the permittee club has caused, permitted, or allowed any person to consume or be served any alcoholic beverage on the club premises at any time on Sunday between the hours of 1:15 a.m. and 10 a.m.

III. EVIDENCE

A. Staff's Evidence and Arguments

Victor Kuykendoll, TABC Enforcement Agent, testified that at approximately 1:34 a.m. on November 29, 2009, he initiated an investigation at the Hitching Post in response to a complaint about parking violations received by the TABC Waco District Office. Upon arrival at the business, Agent Kuykendoll conducted surveillance of the exterior and observed a man (later identified as Scottie Henderson, owner of the business) walking about in the parking lot with a flashlight. Agent Kuykendoll surmised that Mr. Henderson may have been trying to keep customers from parking illegally.

Agent Kuykendoll drove around and parked behind the business, and Mr. Henderson followed and approached him. After identifying himself, Agent Kuykendoll asked Mr. Henderson why he would want to stay open past the hours for alcoholic beverage sales in the area. Mr. Henderson answered that he was still making money off the entry fee at the door of his business. Agent Kuykendoll testified that, upon entering the Hitching Post, he looked around for persons consuming alcohol and immediately observed a woman at the bar drinking from a cup, approximately six feet from a bartender. After questioning the woman about the contents of the cup and being told it was not alcohol, Agent Kuykendoll smelled it and detected a faint odor of alcohol. He then requested that the woman, then identified as LaKeshia Davis, accompany him outside. Agent Kuykendoll walked to his squad car and conducted a portable breathalyzer test on the drink to detect the presence of alcohol. He testified that it came back positive.

Agent Kuykendoll believes that the owner or his employees should have discovered the woman was consuming alcohol by questioning her and checking all of the drinks at the bar. He also believes that the owners have a duty to observe whether anyone is drinking anything at the business after hours and to then investigate whether they are consuming alcohol. He added that the owners should have made the same inquiry he made of Ms. Davis, and they would have discovered that she had alcohol.

TABC Agent Scalon then testified about Respondent's past violations. On July 2009, he observed patrons consuming alcohol outside the Hitching Post and informed Mr. Henderson that this was a violation of the license. He testified that Mr. Henderson asked for his advice and help to prevent these types of violations from occurring in the future. For the violation observed by Mr. Kuykendoll and previous violations, Agent Scalon recommended a penalty of 30 days suspension or a \$9,000.00 fine against the establishment.

B. Respondent's Evidence and Arguments

In response to the allegations, Respondent argues that neither she nor her husband or employees knowingly permitted or allowed the after hours consumption or service of alcohol at the

Hitching Post. In support of her position, Respondent called several employees of the Hitching Post to testify, including Linda Mitchell and Carl Buhl. Ms. Mitchell testified that the establishment has policies to prevent alcohol consumption in accordance with the law prohibiting after-hours drinking. More specifically, she maintained that people are not allowed to bring outside drinks or cups into the Hitching Post. She stated that, at 12:30 a.m., an announcement is made about after-hours consumption. On the night in question, Ms. Mitchell was working at the door taking money, so she did not see Ms. Davis with the cup allegedly containing alcohol.

Mr. Buhl also worked at the door of the Hitching Post on the night of the investigation, but his responsibility was to search patrons and check for alcohol or weapons. He explained that when conducting searches, he uses a metal detector wand and pats down the men if the wand detects something. He does not pat down women but will search their purses if something is detected.

Mr. Buhl testified that on the night of the investigation, he made an announcement regarding the consumption of alcohol at 12:30 a.m. After the announcement, the lights were turned on, and he and another employee picked up drinks, glasses, and cups before the deadline, with each employee assigned a particular area of the establishment to check. He did not see anyone drinking with a cup after 1:00 a.m. on the evening in question. In general, after alcohol is picked up, Mr. Buhl testified that patrons continue to purchase ribs and sodas.

Mr. Henderson testified that he is the owner of the Hitching Post and the husband of the licensee, Mary Henderson. On the evening in question, he was monitoring the parking lot to prevent violations. A few days earlier, another agent had visited the Hitching Post and advised of complaints that people were drinking alcohol in their cars in the parking lot. In order to address that concern, Mr. Henderson had moved outside after-hours to police the parking lot. Otherwise, he would have been inside, monitoring the bar.

When Agent Kuykendoll entered the establishment, Mr. Henderson felt good about the situation. He testified that he looked around at the dance floor and tables and saw no bottles or cans of alcohol. This was in accordance with his instructions to staff to pick up all drinks and glasses

before 1:00 a.m. Although he knew the actual cut-off time for drinking alcohol was 1:15 a.m., he insisted to staff that the cut-off be 1:00 a.m. Mr. Henderson observed Agent Kuykendoll approach a patron (Ms. Davis) standing at the far end of the bar and ask her about the contents of a Styrofoam cup she was drinking from. Mr. Henderson does not know Ms. Davis but overheard her tell Agent Kuykendoll that it was her first time at the Hitching Post. He also overheard her tell Agent Kuykendoll in a very loud voice that it was not alcohol.

Mr. Henderson was not surprised that a bartender or other employee behind the bar would not have observed Ms. Davis. He testified that the bar is 26 feet long and 4 feet tall. He offered a picture of the bar showing a television and other equipment at the end where Ms. Davis was standing. Mr. Henderson opined that the dimensions of the bar would prevent a bartender or another person behind the bar from seeing what a patron was doing on the opposite side and end of the bar.

According to Mr. Henderson, the Hitching Post makes a significant portion of their profits by serving ribs late at night. Because of this aspect of their business, he was not surprised that Ms. Davis had a cup. Although he did not see anyone else with a cup, it was not unusual for a patron to have a cup of ice for their soda with their ribs. Many people get off work at 11:00 p.m., so that is why the Hitching Post's ribs business picks up late night. Mr. Henderson explained that he and his staff had a process to prevent the after-hours consumption of alcohol. Before 1:00 a.m., all drinks and glasses are picked up throughout the establishment. He stated that all cups out after 1:00 a.m. were for sodas purchased after that time. If there was any alcohol in a cup on the night in question, he concluded that the patron must have added it.

IV . ANALYSIS

In order to meet its burden of proof, Staff must prove that Respondent permitted an alcoholic beverage to be consumed on the licensed premises. The only element of the law disputed in detail is whether Respondent *permitted* Ms. Davis to consume alcohol.¹

¹ While some issue was raised as to whether Ms. Davis, in fact, had alcohol in her cup, the ALJ does not need to reach a conclusion on this issue.

Petitioner admitted into evidence video footage of Agent Kuykendall's investigation of the Hitching Post. The video footage is poor, due to the lack of lighting, but the audio is better. It captures Mr. Henderson stating that he was out in the parking lot to make sure there were no violations outside. It also captures Agent Kuykendoll questioning Ms. Davis about the contents of the cup and her denying the presence of alcohol. He explained to her that she was not the target of the investigation and gave her the opportunity to admit to drinking alcohol and to implicate the Hitching Post or its employees. She rejected this offer and adamantly denied any alcohol was in her cup.

Mr. Kuykendall then tested the contents for the presence of alcohol and testified that it positively confirmed the presence of alcohol. He returned to Ms. Davis to report the positive results, but she continued to deny the presence of the alcohol. Mr. Kuykendoll offered the cup to Ms. Davis and her friends to smell in order to detect the presence of alcohol; all of them stated they were unable to detect the presence of alcohol. Ms. Davis then even volunteered to take a breathalyzer in order to prove she had not consumed any alcohol.

After reviewing the evidence, the ALJ concludes that Staff failed to prove Respondent "caused, permitted, or allowed" Ms. Davis to consume or to be served an alcoholic beverage. Rather, the evidence suggests the Hitching Post has an established practice implemented in order to prevent after-hours drinking. Furthermore, the evidence establishes that Mr. Henderson is responsive to issues brought to his attention by the TABC, such as the parking lot issues. Moreover, the record suggests that Staff has some concern with the Hitching Post being open "after hours" at all, but the ALJ finds no legal basis for preventing as much (without further evidence of particular violations of rules or statutes). Upon arrival at the establishment, Agent Kuykendoll immediately questioned Mr. Henderson as to why the business was open after the hours allowed to serve alcohol and warned Mr. Henderson of the added liability this created for nuisance violations.

Respondent argues that the statute requires a showing of knowing consent to the consumption of alcoholic beverages at her business. Staff appears to apply a strict liability standard to this statute, suggesting that if a customer is found drinking an alcoholic beverage after hours then Respondent is

per se liable. But the strict liability standard is not found in the relevant rules and statutes. The relevant portion of the law concerns whether Respondent “caused, permitted, or allowed” the consumption of alcohol. Definitions of “permitted” include “to make possible or afford the opportunity.” So while the ALJ does not find that proof of actual knowledge is necessary for substantiating Staff’s allegations, he also does not find strict liability is at all appropriate. Rather, the ALJ applies a “knew or should have known” standard whereby licensees may not escape liability simply by ignoring after hours consumption. Instead, licensees have a duty to assure that procedures are in place to prevent such consumption.

Another position taken by Staff is that Respondent knew or should have known of the violation because it occurred several feet from a bartender. Petitioner equates the consumption of alcohol in “close proximity” to a bartender to the licensee allowing the consumption of alcohol. However, the evidence does not support such a finding. It appears Ms. Davis may have been blocked from the bartender’s view. And in any event, a customer drinking from a Styrofoam cup after hours would not have raised concern. The cups were provided to patrons with sodas to drink with the late-night food, and the cups were a part of the overall procedures implemented to prevent after hours consumption. Had Ms. Davis had a beer bottle or a glass, then Staff may have successfully proven its allegations.

Having found no reason that Respondent “knew or should have known” Ms. Davis had alcohol in her cup and finding that Respondent has procedures in place to prevent after-hour consumption of alcohol, the ALJ find Staffs petition should be denied.

V. PROPOSED FINDINGS OF FACT

1. On March 22, 2010, Texas Alcoholic Beverage Commission (TABC) sent a notice of hearing to Mary Jo Henderson d/b/a Hitching Post (Respondent) stating that a hearing would be held on this matter on April 22, 2010, at the State Office of Administrative Hearings (SOAH) in Austin, Texas.

2. The notice also contained a statement of the legal authority and jurisdiction for the hearing, a reference to the particular sections of the statutes and rules involved, and a short, plain statement of the matters asserted.
3. On April 22, 2010, the hearing convened at SOAH in Austin, Texas, before the undersigned Administrative Law Judge. Attorney Judith Kennison represented TABC. Attorney R. John Cullar represented Respondent.
4. Respondent is the holder of Wine and Beer Retailer's On Premise Permit, BG-308916.
5. On November 29, 2009, Respondent and her employees had and implemented a reasonable process to prevent the after-hours consumption of alcohol.
6. On November 29, 2009, Respondent did not allow or permit its customer, LaKesha Davis, to consume alcohol during the prohibited hours.

VI. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01 and 11.11.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. There is insufficient evidence to suspend the permit or fine the permittee on the basis of TEX. ALCO. BEV. CODE §§105.06; 61.71(a) (18); 32.17(a) (7).

SIGNED June 9, 2010



TOMMY L. BROYLES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS